International and Foreign Trends Regulating the Freedom of Artistic Expression

Zsolt Cseporán

Assistant lecturer, University of Pécs Faculty of Law

Since the middle of the second decade of the 21st century, it can be observed that the concept of the role of the state in the cultural sphere is changing again, especially in light of the growing demands by individuals as consumers of culture. The constitutional regulation of art reflects the current directions, the formulated aims and the professed values of cultural policy. This implies that the legal regulation of culture and arts shows different models at the international and national levels as well.

Keywords: freedom of artistic expression, cultural life, fundamental rights, international law, constitutional trends

1. The Development of the Protection of Art under International Law

1.1. Introduction: Human Rights in International Law

In the process of recognising human rights, a major component was the appearance of these norms in international law. The definition of the types, content, assurances, limitations and enforceability of human rights became decisive after World War II.[1]

Following World War II, the *international protection* of human rights played an increasingly important role and responsibility, which – beyond the general documents – led to the birth of separate international conventions on the individual groups of human rights. The principal characteristic of the development of documents on international human rights was that initially, they were derived from national fundamental rights catalogues[2] – *i.e.* constitutions of individual states – which, especially in the early stages of development – inevitably, due to the historical, moral-philosophical background – stemmed the approach and conception on natural law.[3] This tendency can also be currently observed in the way states adopt a novel interpretation to certain human rights or introduce entirely new fundamental rights in their constitutions. However, it is more characteristic for the current mode of action that human rights recognised on international level affect national legal systems.[4] A major element of this process is the manner in which national constitutional courts consider the relevant decisions of international legal

[1] J. Petrétei, Az alkotmányos demokrácia alapintézményei, Dialóg Campus, Budapest-Pécs, 2011, pp. 419.

[2] Z. Péteri. Az emberi és állampolgári jogok történetéhez, Jogtudományi Közlöny, Vol. 1998, No. 12, pp. 651.

[3] q.v. A. Sajó, Szabadság, emberi jog, alkotmányosság, Magyar Tudomány, Vol. 1996, No. 1., pp. 3.

[4] cf. Françoise Dreyfus, Les droits economiques et sociaux dans quelques constitutions récentes, In L'Etat de droit. Mélanges enl'honneur de Guy Braibant, Éditions Dalloz, Paris, 1996, pp. 170.

platforms – and their reasoning – as norms. Thus, human rights included in international documents *interact* with fundamental rights of constitutions both in the sense of ontology and implementation.[5]

In universal international law, the first reference to human rights can be found in the Charter of the United Nations signed in 1945, however, this document did not define these rights. The clear aim of international cooperation is the promotion of and support for respecting human rights and fundamental freedoms. The first systematic source of human rights is the *Universal Declaration of Human Rights* proclaimed by the 3rd United Nations General Assembly (10 December 1948) which is considered to be an international catalogue and standard of the relevant rights[6], yet it does not posess legal binding nature and can be considered a soft law instrument – but nonetheless of huge significance.

The proclamation of the Universal Declaration had many consequences relevant to international law. On one hand, the declaration became the *authentic standard of interpretation* for the human rights-related provisions of the UN Charter; on the other hand, the fundamental principle that human rights are *universal* became an intrinsic part of international law. Moreover, the declaration is considered to be a *common denominator* for evaluating the human rights-related behaviour of the member states, and it had an effect on international lawmaking in human rights.[7]

Subsequently, the General Assembly of the United Nations adopted two conventions: the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.[8] The former contains the oldest, so-called *"first generation"* human rights, while the latter states the so-called *"second generation"* rights.

The development process of the European continent in this field represents a unique branch in the international recognition of human rights. The European system of human rights protection is tied primarily (though not exclusively) to the activities of the Council of Europe, whose highlighted goal is the protection of ideas and values of the common European heritage as well as their implementation.[9] Until today the Council of Europe has initiated 221 international conventions, the most important of which is currently the Convention for the Protection of Human Rights and Fundamental Freedoms *(also known as European Convention on Human Rights)* of 1950 which encompasses classic rights and political freedoms.

The international appearance of human rights had far-reaching consequences, evoking quality changes in the structure of international law, as it questioned the exclusive inter-state character of international law by making natural persons the subjects of law and jurisdiction in a legal system separate from national law.[10]

[5] T. Drinóczi, A művészet szabadságának összehasonlító jogi elemzése, In M. Kocsis & P. Tilk (Eds.), A művészet szabadsága – alkotmányjogi megközelítésben, Kodifikátor Alapítvány, Pécs 2013, pp. 101.

[6] Although the declaration remained a General Assembly resolution, which is not a binding instrument of international law, the rights contained therein have become fully recognised.

[7] G. Kardos, Az emberi jogokat védő nemzetközi jogintézmények, In G. Halmai & A. G. Tóth (Eds.): Emberi jogok, Osiris Kiadó, Budapest, 2003, pp. 144.

[8] The two conventions were implemented in Hungary in 1976 by law orders No. 8. and 9. – thus becoming part of the domestic law.

[9] For more details on the legal character of this heritage, q.v. J. Bruhács, Nemzetközi jog II., Dialóg Campus, Budapest-Pécs, 1999, pp. 208.

[10] cf. Bruhács, i. m. pp. 192.

1.2. Recognition of Cultural Rights and Art by International Law

The recognition and definition of cultural rights lagged behind the declaration of civil, economic and social rights on the international level and thus on the national level as well. Despite slow beginnings, the activities of human rights bodies greatly contributed to the clarification of such human rights, the components of which make it possible for individuals to take part in cultural life. Such are the following fundamental rights, principles and prohibitions: equality, the principle of non-discrimination, the freedom of non-intervention into the enjoyment of cultural life, the freedom to create, the freedom to contribute to cultural life, the freedom to choose to take part in cultural life, the freedom of distribution, the freedom of international cooperation, the freedom to participate in the definition and implementation of cultural policies. All of these show that cultural rights are inseparable parts of human rights – despite the fact that not all of the above can be qualified as fundamental rights.[11]

1.2.1. The Universal Declaration of Human Rights

Primarily, the Universal Declaration of Human Rights shall be examined as the first relevant document, to consider whether the freedom of art was recognised upon the international appearance of human rights – *i.e.* in the mid-20th century.

The answer to the question is clear from the text. Article 22 of the declaration contains the following regulation: *"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."*[12]

I wish to draw attention to two elements of the wording in the regulation cited above. The first comes from a strictly textual approach: the document does not contain *expressis verbis* the freedom of art, it only mentions cultural rights, the meaning of which in the given historical context was identical to the characteristics of minority rights.[13] The second is the expression *"entitled to"* which does not recognise the protected values in question in the form of their subjective, vested right and thus ultimately, are not compelling or enforceable.

Apart from Article 22, the matter is also regulated in Article 27*: "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."*[14]

With this article the declaration came one step closer to stating the protection of art in international law, however its recognition as a human right was still yet to come. On one hand, the regulation provides no protection for the creative process of art, but rather the right to enjoy art, which is the *passive, receptive side* of artistic life. On the other hand, the text of the second sentence focuses on the result of the relevant activity, thus the artwork itself, phrasing it as a market term *("product")*, highlighting therefore its use – the expressions of moral and material interests clearly refer to copyright protection. On the other hand,

[11] In detail q.v. Drinóczi, i. m. pp. 102.

[12] Art. 22 of the Universal Declaration of Human Rights.

[13] i.b.

[14] Art. 27 of the Universal Declaration of Human Rights.

the freedom of art does not appear in either the object of the regulation or the type of the norm, as these would require the characteristics of a fundamental right – yet Article 27 attaches no such significance to the creative process.

1.2.2. The International Covenant on Civil and Political Rights

The status set forth in the Universal Declaration of Human Rights remained unchanged until the adoption of the International Covenant on Civil and Political Rights. With said document, however, a clear development of law could be observed, as the freedom of artistic expression appeared imbedded into the freedom of expression*: "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*[15]

In this way, the International Covenant on Civil and Political Rights took the first step towards the recognition of the freedom of art. The covenant provides for the explicit fundamental rights protection of the relevant right within the framework of one of the most important first generation human rights, the freedom of expression. However, beyond stating legal protection, the document regulates not only the content but also the standards of limitation*: "3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."*[16]

Firstly, I wish to point out the declaration of the responsibility tied to the freedom: apart from an individual autonomy, the UN General Assembly prescribed a safeguard obligation to the benefit of the subjects of law, in the case of a lack of public authority non-intervention. It is important to note the formal precondition of the limitation, which prescribes the necessity to legally regulate public intervention. Finally, artistic opinion must be deferred in two cases: on one hand, in respect to the rights of other people, and on the other hand *vis-á-vis* public order and morals. Thus, the limitation of the freedom of expression and art is tied to the application of the fundamental rights test.

1.2.3. The International Covenant on Economic, Social and Cultural Rights

Simultaneously and parallel to the International Covenant on Civil and Political Rights, the UN General Assembly created – specifically for the purpose of regulating cultural rights – the International Covenant on Economic, Social and Cultural Rights as well. On the formulation of the fundamental rights characteristic of art, the document – due to its nature – must meet certain criteria*: "1. The States Parties to the present Covenant recognize the right of everyone:(a) To take part in cultural life;(b) To enjoy the benefits of scientific progress and its applications;(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science*

[15] Art. 2 of the International Covenant on Civil and Political Rights.
[16] Art. 3 of the International Covenant on Civil and Political Rights.

and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity."[17]

Through this regulatory scheme, the covenant assumed a direction unlike any other international norm. Article 15 is able to encompass almost all aspects of the constitutional models of art. On one hand, item no. 1 adopts the ownership-like approach of artistic activity from Article 27 of the Universal Declaration of Human Rights. Although this measure is not synonymous with the fundamental rights protection outlined above, it is still considered a freedom-type regulation. On the other hand, item no. 2 requires active participation from the states in relation to issues of culture, however this can be indirectly assumed to extend to art as well. Finally, item no. 3 regulates the *status negativus* behaviour of the state towards respecting the freedom of artistic activity, which directly reinforces its freedom-like nature and may be regarded as an implicit forerunner of the principle of state neutrality.

2. The European Curve of the Recognition of Art as a Fundamental Right

2.1. The European Convention on Human Rights and the Case-law of the European Court of Human Rights

The European Convention on Human Rights (hereafter ECHR) and the activities of the European Court of Human Rights (hereafter ECtHR) belong to the previously outlined developments. Article 10 of the above-mentioned convention is to be applied for the protection of artistic expression*: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."*[18]

It is absolutely clear from the text of the international convention that the norm lacks the individual protection of art, therefore its human rights protection shall be secured within the framework of the freedom of expression.[19] This enhances the role of the European Court of Human Rights in the European protection of the fundamental rights of artists.

It is apparent from the case-law of the ECtHR that artistic expression prevails within the boundaries of the freedom of expression – as an indication that the document does not qualify the freedom of art as a independent human right. As a rule of thumb, it can be stated that the ECtHR provides a relatively broad field for discretion of the member states.[20] Additionally, it is noteworthy that in the case-law of the court, the higher level of protection of the freedom of art in relation to the freedom of expression was mainly ruled in flagrant cases, when artists were punished with imprisonment for their works of art.[21]

[17] Art. 1-3 of the International Covenant on Economic, Social and Cultural Rights.

[18] Art. 10 of EHCR.

[19] cf. H.J. Blanke, Kommunikative und politische Rechte, In D. Merten & H.J. Papier (Eds.), Handbuch der Grundrechte in Deutschland und Europa, Band VI/1 Europäische Grundrechte I, C. F. Müller, Heidelberg, 2010, pp. 233.

[20] A. Grád & M. Weller, A strasbourgi emberi jogi bíráskodás kézikönyve, HVG-ORAC, Budapest, 2011, pp. 570.

[21] q.v. Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24; Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133; Scherer v. Switzerland judgment of 25 March 1994, Series A no. 287; Otto-

2.2. Arts in European Union law: the Charter of Fundamental Rights of the European Union

The mechanism of protecting fundamental rights of the European Union is closely related to the Charter of Fundamental Rights of the European Union[22] (hereafter: Charter) therefore, prior to the assessment of artistic aspects, it is required to discourse on the nature and application thereof.

Although the Treaty of Lisbon has raised the Charter to the level of the Treaties, it was prepared to be a declaration only and not an applicable, contractual text. Thus, it lists the rights, yet the restrictions and content of the rights cannot be determined in advance *in abstracto*.[23] Furthermore, the member states sought to determine the application of the Charter based on interpretative rules. These appear in the following general provisions.[24]

Firstly, in the scope of application, Art. 51(1) of the Charter states that, in accordance with the principle of subsidiarity, the Charter is addressed to the institutions, bodies, offices and agencies of the Union. At the same time, it can be ascertained that the requirement to respect fundamental rights defined in the context of the Union is only binding when the member state applies Union law.[25] This in turn means that the Charter does not ensure the protection of fundamental rights in general and sets the boundaries of the protection of fundamental rights, *rationae materiae*,[26] by the European Union. Secondly, the Charter may not extend the scope of the European Union law beyond the competence of the European Union, and it may not establish new competencies or modify the existing rights in any event.[27] Thirdly, regarding the effect and interpretation of the rights and principles declared in the Charter, Art. 52, on one hand, contains the rules on the limitation of the rights and principles with particular emphasis on the principle of proportionality; on the other hand, it provides for consistency between the Charter and the ECHR by ensuring more extensive protection of rights; finally, it refers to taking national law into account. Fourthly, by determining the level of protection, Art. 53 states that the interpretation of the Charter may not result in the restriction of the content of human rights and fundamental freedoms. Based on this, the principle of "the most favourable provision" must be applied: the level of protection provided

Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A; Karatas v. Turkey judgment of 8 July 1999, no. 23168/94; Polat v. Turkey judgment of 8 July 1999, no. 23500/94.

[22] At the time of the establishment of the European Economic Community, the founding fathers omitted the catalogue of human rights from the foundational treaty, and initially the attitude of the Court of Justice of the European Union was also moderate in the elaboration of human rights as part of Community law. However, this approach has later been reversed so that the national courts and constitutional courts would not to be entitled to override the provisions of Community law on grounds of the protection of fundamental rights. Thereafter, the Charter of Fundamental Rights was the next milestone concerning the incorporation of fundamental rights into EU law, though until 2009 it constituted only soft law and not a rule binding for the member states.
cf. E. Szalayné Sándor, Gondolatok az Európai Unió alapjogi rendszerének metamorfózisáról, Európai jog, Vol. 2003, No. 2, pp. 9-16.; M. Weller, Az Európai Unió Alapjogi Kartája, Acta Humana, Vol. 2001, No. 43, pp. 31-44.; and F. Gárdos-Orosz, Az Európai Unió alapjogvédelmi rendszere és az Emberi Jogok Európai Bírósága – A kettős európai alapjogvédelem és a magyar alkotmányjog, Jog – Állam – Politika, Vol. 2011, No. 4, pp. 80-82.

[23] L. Blutman, Az Európai Unió joga a gyakorlatban, HVG-ORAC, Budapest, 2013, pp. 523.

[24] q.v. M. Niedobitek, Die Grundrechte charta der Europäischen Union, In D. Merten & H.J. Papier (Eds.), Handbuch der Grundrechte in Deutschland und Europa, Band VI/1 Europäische Grundrechte I, C. F. Müller, Heidelberg, 2010, pp. 970-976.

[25] A. Osztovits (Ed.), Az Európai Unióról és az Európai Unió Működéséről szóló szerződések magyarázata 1., CompLex Kiadó, Budapest, 2011, pp. 569.

[26] Blutman, op. cit. pp. 83.

[27] Art. 51 (2) of the Charter of Fundamental Rights.

by the Charter may not be lower than the protection afforded by the ECHR.[28] Finally, Art. 54 contains the prohibition of the abuse of rights which emphasises the conditional nature of this principle: the breach thereof is always accompanied by the breach of some other right or freedom.[29]

In light of the above, the artistic element of the protection of fundamental rights by the European Union is incorporated in Art. 13 of the Charter, where the freedom of the arts is *expressis verbis* declared: *"Article 13 - Freedom of the arts and science*
The arts and scientific research shall be free of constraint. Academic freedom shall be respected."[30] This text treats the elements relating to artistic works specifically and as an independent human right, when stipulating the nature thereof as a freedom.

The European Union's accession to the ECHR is intended to bind the latter two levels of the three-level fundamental rights protection, i.e. the three levels being the national constitutional, Union and international law levels,[31] the relationship of which is markedly expressed in the interpretative rules of the Charter.[32]

As the case-law of the Court of Justice of the European Union does not include interpretative standards concerning the content of the freedom of art, the succinct wording of the provision simply suggests that the Charter considers the human rights institution of art a freedom implying the definition of the individual right as broadly as possible.[33] Moreover, the freedom of art is the fundamental rights core of the freedom of expression, thus regarding this institutional context – as confirmed by the literature[34] – the restriction of arts can be closely related to the freedom of expression.[35]

Furthermore, the institutional contexts of the freedom of arts should be considered: the content and the scope of this right are identical to the content and the scope of the rights provided for in Art. 10 of the ECHR, as the latter is identical to Art. 11 of the Charter on the freedom of expression. The intellectual property protection should also be emphasised as a form of the right to property which is specifically mentioned in Art. 17.[36]

In summary, the fundamental rights foundation of arts in international law has been the outcome of a lengthy process: it was not declared in any convention other than the Charter as a direct and independent human right. For the sake of completeness, it must be stated that although this is not true in the case of the freedom of artistic activity, the expression- or property-based concept of art is contained in all international documents.

[28] Osztovits (Ed.), op. cit. pp. 575.

[29] Osztovits (Ed.), op. cit. pp. 576.

[30] Art. 13 of the Charter of Fundamental Rights.

[31] q.v. E. Szalayné Sándor, Alapjogok (európai) válaszúton – Lisszabon után, Jogtudományi Közlöny, Vol. 2013, No 1, pp.15-27.

[32] q.v., in particular, Art. 52 and 53 of the Charter of Fundamental Rights

[33] In relation to this, q.v. the issue of fundamental right-related legal capacity in the freedom of arts. Zs. Cseporán Zsolt, Művészet és emberi jogok, Jura, Vol. 2015 No. 2, pp. 20-27.

[34] q.v. A. Koltay, A művészet szabadsága: a nem létező alapjog, Pázmány Law Working Papers, Vol 2016, No. 4.

[35] Osztovits (Ed.), op. cit., pp. 494.

[36] q.v. Drinóczi, op. cit., pp. 105.

3. Trends of national legislation

In the remainder of the paper, I will abandon the solutions of international law and aim to assess the basic laws of other countries, where the focus of the analysis is based on the constitutional triad model of arts.

3.1. The system of national legislations

3.1.1. The depths of constitutional provisions

The depth of the provisions indicates the level of detail of the analysed state's constitution in relation to the given subject. In this regard, the key aspects to be examined are the structure of the state (federal or unitary), the characteristics of the state arising from its historical limitations (multi-ethnic, multilingual or other), the era of the adoption of the constitution (19th, 20th or 21st century), and the possibility to amend the constitution (inflexible or flexible). These factors have a significant impact, on the structure of the constitution and also the elaboration thereof in the light of the specific provision.[37]

In the case of federal states, it is the cardinal task of the constituent organ to provide for the distribution of powers between the federal state and the (member) states (Bunds, cantons, communities, etc.). This also applies to states with autonomous communities or territorial units with a special status, since these can be typically linked to specific minorities. The distribution of powers shall, in particular, mean the demarcation of the legislative and the executive competencies: such states determine at the constitutional level the exclusive powers of the federal state and the state parliament. Specifically: which are the functions that may be performed by the federal state jointly with the territorial units and which are fields in which decisions may be made only at local level. In practice, in the case of federal states, culture and arts are regulated at local level, while the protection of the national cultural heritage falls within the competence of the state.[38] Conversely, the constitutions of *multi-ethnic or multilingual states* state in greater detail the rights of minorities to identity, cultural autonomy and language.[39]

3.1.2. The content of constitutions

When examining the content of the constitutions, the legal value in focus – in this case, the freedom of arts – in certain states is not mentioned *expressis verbis,* but rather the freedom of speech together with the prohibition of censorship constitute the content of the constitution. These legal systems broadly interpret the relevant constitutional provision and consider arts as the integrated part of the freedom of expression.

When we examine how the freedom of arts is reflected in the constitutions of certain states and what kind of correlations it indicates, we may find the following expressions: *1)* the protection of cultural

[37] Drinóczi, op. cit., pp. 106.

[38] In detail q.v. Drinóczi: op. cit., pp. 107.

[39] Ibid.

wealth and the right to culture,[40] *2)* freedom of arts, *3)* protection of intellectual property,[41] and *4)* the promotion, support of culture and/or arts.[42]

3.2. The models of certain states

I shall demonstrate the foreign legislation in relation to the freedom of arts through the analysis of the constitutional practice of non-randomly chosen states. In regards to the states detailed below, I considered their legal systems, constitutional traditions, geographical locations and historical limitations. Therefore, I shall demonstrate the two main types of European continental law,[43] the German and Latin schools through the legislation of Germany and Italy. Furthermore, I shall analyse the basic laws of Sweden from the Nordic region and the Czech Republic from the Central European region, while I will demonstrate the tendencies of the Mediterranean and the Balkan region through the example of Croatia and Greece. Finally, I shall analyse the characteristics of the overseas legal system in light of the Constitution of the United States of America.

3.2.1. Germany

Art. 5 of the Constitution of the Federal Republic of Germany (1949 *Grundgesetz-GG*) provides for the protection of fundamental rights related to the means of expression in three separate Sections. Accordingly, the first Section covers the freedom of expression and the freedom of press with special reference to the means of expression and the prohibition of censorship. The second section states the restriction test of these rights, while the third Section declares the cultural rights – namely the freedom of arts, science and teaching. The Federal Constitutional Court and the Federal Administrative Court argue that the order within the Article was not a coincidence as the second section (the rule on the restriction) only applies to the freedom of expression and press.[44]

The wording of the third Section relevant to the theme is the following: "Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution."[45]

[40] q.v. Art. 23 of the Constitution of the Kingdom of Belgium, Art. 9 of the Constitution of the Italian Republic, Art 8 of the Constitution of Malta, the Preambles of the Constitutions of the Kingdom of the Netherlands and Spain, Art. 61 and 71 of the Constitution of the Republic of Slovenia, Art. 42.1 of the Constitution of the Republic of Lithuania. Moreover, the Constitution of the Portuguese Republic contains the right to cultural enjoyment and creation (Art. 78), the freedom to access the products and values of culture and the right to access culture is provided for in the Constitution of Romania (Art. 33) and in the Polish basic law (Art. 6).

[41] Constitutionally determining the protection of intellectual property is the solution of the more recent constitutions. Art. 113 of the Constitution of the Republic of Latvia and Art. 39 of the Constitution of the Republic of Estonia protect the copyrights and patent rights, while Art. 60 of the Slovenian basic law guarantees other rights deriving from artistic, scientific, research, and invention activities.

[42] In detail q.v. Drinóczi, op. cit., pp.108-109.

[43] Constitutionally determining the protection of intellectual property is the solution of the more recent constitutions. Art. 113 of the Constitution of the Republic of Latvia and Art. 39 of the Constitution of the Republic of Estonia protect the copyrights and patent rights, while Art. 60 of the Slovenian basic law guarantees other rights deriving from artistic, scientific, research, and invention activities.

[44] Drinóczi, op. cit., pp.115.

[45] Art. 5 (3) of the Constitution of the Federal Republic of Germany.

The German solution clearly shows that it applies the universal model of the protection of arts at the constitutional level: *"arts shall be free"*. The laconic wording of the GG leaves much room for such interpretation of the constitution which clarifies the content of the provision. First and foremost, the emphasis of the character of an individual right is obvious as this is what can be first inferred from the attributive *"free"*. The quality of being a direct fundamental right is the backbone of the constitutional norm: it conferred public prerogatives on individuals. However, this allowed the German Federal Constitutional Court to identify several safeguards that are state-side criteria apparent from the provision. This includes the relationship between arts and the cultural state as the objective aspect of the fundamental right.[46] However, the neutrality of state considered to be the third model of arts does not strongly appear in an independent form in the German constitutional mindset, instead the objective obligation of institutional protection is typically emphasised.

3.2.2. Italy

The Constitution of the Republic of Italy (1948 *Constituzione della Repubblica Italiana)* provides for the freedom of arts in a unique way. The basic law recognizes the constitutional value at hand as an independent fundamental right, however, while it declares the freedom of expression among the civil rights, the freedom of arts is declared in Chapter Two, thus in moral and social relationships.

Accordingly, Sec. 33 (1) of the Constitution applies the following terminology: *"The Republic guarantees the freedom of the arts and sciences, which may be freely taught."*[47]

The Italian constitutional body also applied the general definition of declaring arts a fundamental right which gives room for complex interpretation. However, the individual right aspect should, by all means, be highlighted. Furthermore, the *expressis verbis* declaration of the teaching of arts among the freedoms is also a unique solution. The special significance of this resides in the fact that not only does the Italian basic law provide a parallel listing of cultural rights – that is the right to education, the freedom of science and arts – but also treats them as an inseparable entity. In the light of arts, this also means that through the right to education the infrastructural background thereof is elaborately outlined. However, the commentaries on Art. 33, which declares the freedom of arts and science, did not provide clear answers to the interpretation of the term 'arts', contrary to the detailed description of 'science'. When interpreting the free expression of the works and values of art, Art. 21 of the Constitution declaring the freedom of expression is generally referred to, which allows for the free manifestation of thoughts orally or in writing. However, the canon related to the artistic value of these "products", the form of manifestation or the criteria of their assessment remain unclear.[48]

3.2.3. Sweden

Following World War II, the Constitution of the Kingdom of Sweden (1991) was significantly altered as a result of the constitutional process of 1975 and the expansion of the catalogue of human rights. In contrast, the Swedish basic law does not grant individual fundamental rights protection to the freedom of arts: under Art. 13 (2), the protection of artists applies only within the context of the freedom of expression. As far as the fundamental right at hand in concerned, none of the elements of the triad model

[46] q.v. BVerfGE 35, 79 (331).

[47] Sec. 33 (1) of the Constitution of the Republic of Italy.

[48] q.v. Drinóczi, op. cit. pp. 120.

of arts is recognized in Sweden*: "In judging what restrictions may be made by virtue of Paragraph (1), particular regard shall be paid to the importance of the widest possible freedom of expression and freedom of information in political, religious, professional, scientific and cultural matters."*[49]

The Swedish constitutional body did not consider the separate declaration of the freedom of arts to be important, but within the freedom of expression, as part of the category of cultural matters, the freedom of arts can be considered implicitly protected. Additionally, the freedom of arts is protected in such a way that the degree of state interference was noticeably restricted compared to the freedom of expression. Furthermore, Art. 19 states that "Authors, artists and photographers shall own the rights to their works in accordance with provisions laid down in law."[50] Therefore, apart from the opinion-based concept, the Swedish system of protection of fundamental rights treats private law (copyright) protection as a guarantee provided for in the constitution – supplementing the scope of the fundamental rights guarantee.

3.2.4. The Czech Republic

The Constitution of The Czech Republic (1992) does not contain the catalogue of fundamental rights with the Charter of Fundamental Rights and Freedoms as the source thereof. Under Art. 112 (1) of the Constitution, the latter collection of norms forms a part of the constitutional order of the state.[51] The Charter contains the specific fundamental rights classified, in relation to which we can also conclude that the freedom of arts is provided for, not only separately from the freedom of expression but also in a separate chapter. While the latter can be found in Art. 17 among the political rights of the chapter entitled *"Human rights and fundamental freedoms"*, the former is stated amongst economic, social and cultural rights. Accordingly, Art. 34 (1) of the Charter should be reviewed, the wording of which is the following: *"The rights to the fruits of one's creative intellectual activity shall be protected by law."*[52]

The term of *"the fruits of one's creative intellectual activity"* of the basic law allows us to draw three conclusions. Firstly, by applying the attribute *"intellectual"*, not only the artistic but also the scientific products are granted constitutional protection, including all the *"products"* of cultural rights in a broader sense. Secondly, the Czech constitution does not provide for the traditional character of the freedom of arts, that is the protection of creative work as specific expression, either. It focuses instead on the result thereof, the works of art or science. Thirdly, the level of legislation on the protection of the fruits of one's creative intellectual activity is noteworthy, as the normative text makes it clear that it safeguards the right within the framework of laws and not within a direct constitutional framework. Moreover, the protection of artistic work may be expressed through the right to freedom of expression, as a specific auxiliary solution.

[49] Art. 13 (2) of the Constitution of the Kingdom of Sweden.

[50] Ibid. 919.

[51] It must be noted that the Charter – resulting from the historical limitations of its adaptation – is the persistence of the Czechoslovakian constitutional order. In detail q.v. J. Pauer, VomGebrauch des Rechts. Die Tschechische Republik auf dem Wegzum Rechtsstaat In W. Eichwede (Ed.), Recht und Kultur in Ostmitteleuropa (Analysenzur Kultur und Gesellschaft imöstlichen Europa. Band 8), Forschungstelle Osteuropa – Edition Temmel, Bremen, 1998, pp. 312-316.

[52] Art. 34 (1) of the Charter of Fundamental Rights and Freedoms.

3.2.5. Croatia

In relation to the recognition of cultural rights, the provisions of the Constitution of the Republic of Croatia (2010) support the assumption of the literature that the basic laws of the Eastern bloc states – due to their late adoption – contain detailed provisions on economic, social and cultural rights.[53] This also applies to the complex recognition of the freedom of arts, compared to the solutions of Western states. Art. 69 of the constitution of Croatia states the protection of cultural rights, thus the declaration of the fundamental rights protection of arts*: „The freedom of scientific, cultural and artistic creativity shall be guaranteed. The state shall encourage and support the development of science, culture and the arts. The state shall protect scientific, cultural and artistic assets as national spiritual values. The protection of moral and material rights deriving from scientific, cultural, artistic, intellectual and other creative efforts shall be guaranteed."*[54]

The constitutional body provides three-way protection to the freedom of arts. Firstly, it recognizes the fundamental rights quality of the freedom of arts when mentioning the freedom of artistic creativity as the substance of the fundamental right. Secondly, it sets forth the state's unique active role within the framework of its objective institutional protection obligation by using the term 'support' in connection with the development of arts. Thirdly, it explicitly refers to the products of artistic activities – i.e. artistic works – and it also indicates the reason thereof: namely, the intellectual values of the Croatian people. Moreover, the protection of copyrights – moral and material rights – stemming from the right to property can be detected here as well.

Through this solution, the Croatian constitution incorporates two elements of the triad model of the freedom of arts *expressis verbis* into the scope of the constitutional protection – thus providing a more complex protection for the individuals and the art scene compared to the states listed above.

3.2.6. Greece

The current Greek constitution *(Constitution of the Hellenic Republic)* was adopted in 1975 and it has been amended only three times since then. Nevertheless, the protection of arts – or cultural rights, in a broader sense – has an extensive protection system. The constitutional body provided for the issue of the freedom of arts in Part Two of the basic law, among the individual and social rights, in Art. 16 (1). Pursuant to this "*art and science, research and teaching shall be free and their development and promotion shall be an obligation of the State."*[55]

On one hand, the constitution declares the general definition of the freedom of arts by placing the freedom at the beginning of the paragraph. Just as in the case of the previously discussed states, this results in the freedom of the individual, maintaining the public authority *status negativus*. On the other hand, similarly to the Croatian solution, the constitutional body specifically provides for the active obligation of the state concerning the development of arts – this constitutes the objective side of the fundamental right. Nevertheless, the order of the cultural rights in the Greek constitution may be of interest: art is at the forefront of the provision, preceding the right to the freedom of science and the right to education.

[53] q.v. Drinóczi, op. cit., pp. 101.

[54] Art. 69 of the Constitution of the Republic of Croatia.

[55] Art. 16 (1) of Constitution of the Hellenic Republic.

3.2.7. The United States of America

The First and Fourteenth Amendments of the Constitution of the United States of America protect the works of art – regardless of the medium of its conveyance or the content, the quality or the unpopular nature thereof.[56] Accordingly, the process of artistic creation and the result thereof are granted constitutional protection, at the same level of completeness as verbally uttered or printed words, as art is also *"speech"*.[57] This means that the solution of the United States also fails to recognize the freedom of arts as an independent fundamental right,[58] yet this isn't necessary as the freedom of speech has prominence in its constitutional system[59] within which artistic expression is also granted protection.[60]

In this respect, the Supreme Court has not given – and could not give – a precise definition of what it considers art (creative art, artistic performances), rather choosing to decided on a case-by-case basis.[61] What is certain is that art which contains political opinion always falls under constitutional protection. However, it seems as though in some cases *"purely artistic"* art has less worth.[62]

4. Summary

After reviewing the fundamental rights provisions of international conventions, it can be established that the human rights quality of the freedom of arts *expressis verbis* is solely characteristic of the Charter of Fundamental Rights of the European Union. In general, the other relevant and significant international conventions provide for artistic expression within the scope of the freedom of expression, in some cases supplementing this protection with the property right protection of artistic products.

The various national solutions paint a rather heterogeneous picture. The model constitutions of the German and Latin branches of European continental law recognize the freedom of arts as a subjective right, but the objective side may only be inferred from the case law of the constitutional courts. Neither the Swedish nor the Czech constitutional bodies declared the independent protection of the freedom of arts: the former refers to the extensive protection of cultural rights within the freedom of expression, whilst the latter highlights the result of artistic expression. However, the two states of the Mediterranean and Balkan region reviewed above play a pioneering role in terms of fundamental rights protection – at least compared to the former constitutional terminologies. The Croatian and Greek constitutions protect the art scene, concerning both its subjective and objective aspects – additionally, it provides a particularly active attitude in relation to the latter component.

[56] Drinóczi, op. cit., pp. 121.

[57] R. M. O'Neil, Artistic freedom and academic freedom, Law and Contemporary Problems, Vol. 1990, No. 3, pp. 177-178.; J.E. Rothman, Freedom of Speech and True Threats, Harvard Journal of Law & Public Policy, Vol. 2001, No. 25, pp. 283.

[58] q.v. R.P. Bezanson, Art and the Constitution, University of Iowa Legal Studies Research Paper, Vol. 2008, No. 08-12.

[59] R.A. Sedler, Freedom of Speech: The United States versus the Rest of the World, Wayne State University Law School Research Paper, Vol. 2006, No. 07-21.

[60] J.G. Murphy, Freedom of Expression and the Arts, Arizona State Law Journal, Vol. 1997, No. 29, pp. 549.

[61] In detail q.v. R.P. Bezanson, Art and Freedom of Speech, University of Illinois Press, 2009.

[62] O'Neil, op. cit., pp. 178., 179., 181.

Dublin III and Beyond: Between Burden-sharing and Human Rights Protection

Andrei Dragan

Central European University, Human Rights Master of Law, Budapest

The main purpose of this paper is to point out briefly the deficiencies of the present-day Dublin system and to outline one of the proposals that seeks to offer a solution that would make burden-sharing between the Member States possible and desirable and also protect human rights.

Keywords: Dublin III Regulation, burden-sharing, EU Commission, reform.

Enacted as an instrument seeking to establish clear guidelines on determining the Member State responsible for examining an application for international protection, the Dublin Regulation,[1] presently in its third generation (after the previous Dublin Convention and Dublin II Regulation,[2] the latter being repealed by the present Regulation), is considered to be the cornerstone of the EU's Common European Asylum System, or CEAS. While many of its principles, such as its overall emphasis on family reunification,[3] prevention of forum-shopping or of the so-called "orbit cases", in which there is no Member State which takes responsibility for refugees or asylum-seekers,[4] are to be regarded as essential aspects of any asylum system, it is also true that the Dublin System, in its drive towards a speedy system of establishing the responsible Member State, also has very serious deficiencies. Consequently, this paper aims to present some of the defects of the Dublin System, as well as some ideas on which a reform of the system should be based.

The main issue with the Dublin System is the fact that, in practice, it does not offer an efficient framework for burden-sharing,[5] mainly leaving the border states (such as Greece, Italy or Hungary)[6] to deal with a disproportionate amount of refugees and asylum-seekers. This is in principle due to the philosophy that underpins the whole Dublin System. According to the Dublin III Regulation, the

[1] Regulation (EU) No. 604/2013 of the European Parliament and Council, OJ L 180, hereinafter "Dublin III Regulation".

[2] Regulation (EU) No. 343/2003 of the European Parliament and Council, OJ L 50/2, hereinafter "Dublin II Regulation".

[3] Recital 14 of the Dublin III Regulation preamble emphasizes this point: "In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation."

[4] For the purposes of this essay, I am using the term "refugee" to refer to those persons seeking international protection who have been officially recognized as such by the authorities of one Member State, while the term "asylum-seeker" will refer to those individuals which have not yet been recognized as refugees. It has to be borne in mind that, in the letter and spirit of the 1951 Geneva Convention on the status of refugees, upon which the Dublin System heavily relies, the status of refugee exists from the moment an individual meets the criteria set forth by the Convention and not from the moment of official recognition. In any case, refugee status is not granted, as it exists independently of state recognition.

[5] Even though the CJEU recognized that Greece was faced in 2010 with a "disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice". See the joined cases of N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, [2010] ECLI:EU:C:2011:865, para. 87.

[6] Jesus Fernandez-Huertas Moragay & Hillel Rapoport: Tradable Refugee-admission Quotas and EU Asylum Policy, in CESifo Economic Studies, Vol. 61, 3/2015, 638–672, p. 639.

principle of authorization,[7] as established by article 3(1), entails that only one Member State shall be responsible for the application procedure. Afterwards, the Regulation sets up a hierarchy of criteria under which the responsible state is to be determined, including family unity,[8] the best interest of the child,[9] the place where the applicant first lodged his/her application[10] etc. All in all, "responsibility for examining an application for international protection lies primarily with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, subject to exceptions designed to protect family unity".[11] Thus, the rationale for the present Recast Dublin Regulation is the same as the previous one.

However, in a 2015 report prepared by ICF International for the European Commission, it is pointed out that the Dublin System has limited distributive effect,[12] with many Member States (including Greece, Estonia, Croatia, Luxembourg, Latvia, Romania and Slovenia) having net transfers close to zero, meaning that the number of refugees or asylum-seekers they transfer is nearly identical to the number they receive.[13] Ironically, the report also notes that the hierarchy of criteria for the allocation of responsibility does not take into consideration Member States' capacity to provide protection and was not designed to distribute responsibility evenly.[14] Neither does the primacy of the principle of family unity over other criteria reflect in reality, as the criteria most used are related to documentation and entry reasons.[15]

Moreover, the Dublin System is seen as being based on the assumption that all Member States are complying with EU law and providing for quick and efficient asylum application procedures which are respecting a common set of standards.[16] In practice, on the other hand, reception conditions and recognition rates vary greatly from one Member State to another.[17] For example, the Italian Refugee Council reported that by the end of 2014, only 64'625 asylum seekers filed their applications in Italy from a total number of around 170'000,[18] which would suggest that many asylum seekers are moving on to other countries searching to file their applications there instead. It has been rightfully suggested that instead of seeing this movement as forum shopping, it should be viewed as a search for efficient and quick asylum procedures, as EU law *should* be guaranteeing, especially since the fact is that the Italian bureaucracy has been often criticised for being slow in registering asylum applications.[19]

[7] Zelalem Mogessie Teferra: The Dublin System of Refugee Admission: A Law and Economics Analysis (9 November 2014). Available at SSRN: https://ssrn.com/abstract=2521180 or http://dx.doi.org/10.2139/ssrn.2521180 (3 October 2017).

[8] Dublin III Regulation, articles 6-11 all make reference to family members of the asylum-seeker.

[9] Ibid, Article 8 (1).

[10] Ibid, Article 7 (2).

[11] See the Commission's proposal COM(2008) 825 final, OJ C 317, p. 6.

[12] ICF International, Evaluation of the Dublin III Regulation. Final report, 4 December 2015.

[13] Ibid, p. 10.

[14] Ibid, p. 11.

[15] Ibid.

[16] Vincent Chetail: The Common European Asylum System: Bric-à-brac or System?, in Reforming the Common European Asylum System: The New European Refugee Law, V. Chetail, P. De Bruycker & F. Maiani, eds, Martinus Nijhoff, 2016, pp. 3-38, Criminal Justice, Borders and Citizenship Research Paper No. 2564990, p. 34.

[17] Enhancing the Common European Asylum System and alternatives to Dublin, a study by the Directorate General for Internal policies, Policy department C: Citizen's rights and constitutional affairs, Brussels, 2015, p. 55.

[18] Ibid.

[19] See http://the-ipf.com/2016/11/09/asylum-seekers-reception-italy/ (3 October 2017) and the UNHCR's Recommendations on important aspects of refugee protection in Italy, 2013, p. 11: "The delays are the result of structural gaps and lack of capacity in the existing reception system, slow administrative procedures and problems in the registration of the asylum applications".

With this in mind, it is essential to note that the EU asylum system is based on a principle which resides at the core of EU law itself, namely the principle of mutual trust, which presupposes that each Member State presume, save in exceptional situations, that all other Member States are complying with EU law, especially with fundamental rights.[20] The issue with mutual trust is that the CJEU's understanding of it could conflict with human rights' protection, particularly in the case in which, by implementing the Dublin III Regulation, a Member State which is not responsible for an individual application decides to transfer an asylum-seeker to the responsible Member State. This was the case in *N.S. and M.E.,*[21] where the CJEU found an obligation for the Member State not responsible, but on whose territory the asylum-seeker was to be found, to nevertheless examine an asylum application if the asylum-seeker would face inhuman or degrading treatment in the Member State where he would be transferred (the responsible state).[22] The CJEU's decision follows a previous ECtHR decision, *M.S.S. v Belgium and Greece,*[23] where the latter established that article 3 of the ECHR (prohibiting inhuman or degrading treatment and torture) would be violated if there is a "real risk" that a person might endure poor living conditions in the state where he/she might be transferred or if that person would face a "real risk" or *refoulement* to the country of origin.[24] However, even though the CJEU mentioned *M.S.S.* in its judgment of *N.S. and M.E.* and uses the ECtHR's "real risk" threshold, it nevertheless understands "real risk" as being the result of "systemic deficiencies" in a Member State's asylum procedures.[25] Thus, the EU standard is higher, requiring that there be "systemic deficiencies". It is easy to see that this reading of the Dublin II Regulation holds on to mutual trust as much as possible and only obliges non-responsible Member States to take charge of the application procedure if there are "systemic deficiencies" in the asylum procedures of the responsible Member State. This high threshold has been criticised for not taking into consideration less institutional and more individual situations in which a "real risk" of inhuman or degrading treatment might exist, but without "systemic deficiencies".[26] It was nevertheless expressly included in the text of the Dublin III Regulation, in article 3(2), which talks of "systemic flaws".

Mutual trust might seem a logical underlying principle in areas where EU law is harmonized and, thus, one should expect a universal standard to be applied in all Member States, but it can lead to perverse results. As in the case of the above mentioned Italian asylum system, while in theory conditions ought to be the same in all EU Member States, in practice they are not. Its seems that, by requiring such a high threshold, mutual trust is locking the system into a collision course with the more human rights-friendly ECHR standard. Of course, in more cases such as *C.K, H.F., A.S. v. Slovenia* [2017],[27] the CJEU seems to have abandoned the "systemic deficiencies" requirement, relying just on "real risk", but it might also be the case that this later decision is a *lex specialis* to the general rule established by *N.S. and M.E.* After all, the CJEU still mentioned "systemic deficiencies", even though in the particular situation of *C.K, H.F., A.S,* the threshold did not apply. However it might be interpreted, it is a sign that the Court has realized the unfair nature of the Dublin system and has moved closer to the ECHR standard. Seeing how

[20] Opinion 2/13 [2014], ECLI:EU:C:2014:2454, para. 191.

[21] See supra note 5.

[22] Ibid, paras. 98 and 108.

[23] M.S.S. v. Belgium and Greece (App. No. 30696/09) ECtHR (2011).

[24] Ibid, para. 358.

[25] N.S. and M.E., [2010] ECLI:EU:C:2011:865, see supra note 5, para. 94.

[26] Hemme Battjes & Evelien Brouwer: The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?, in Review of European Administrative Law, vol. 8, no. 2, 183-214, Paris legal publishers, 2015, p. 190.

[27] C-578/16 PPU C.K, H.F., A.S. v. Slovenia, [2017] ECLI:EU:C:2017:127, para. 98. Here, the CJEU held that "even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum-seeker within the framework of Regulation No. 604/2013 can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article".

a similar relaxing of the mutual trust principle has occurred also in the case of European Arrest Warrants,[28] it might not be a singular change of paradigm, but a general tilt of the CJEU towards a more human rights-friendly system.

However, from a human rights perspective, it is evident that the Dublin system still leaves much to be desired as it allows states a large margin of discretion of whether to resort to the inherently discretionary sovereignty and humanitarian clauses. While the CJEU has stepped in and tilted slightly towards the ECHR standard, it still needs to be pointed out that this "correction" occurred precisely because the Dublin Regulation was unclear. Moreover, I would like to point out to those cases in which an asylum-seeker or refugee pending transfer to another Member State would not suffer inhuman or degrading treatment, at least as it is understood by the ECtHR or the CJEU, but would nevertheless be subjected to distress. A more humane system, which takes more account of the asylum-seekers' or refugees' personal situation and needs is required, one which also entails burden-sharing, a principle which is presently not envisaged by the present legal framework.

But in finding an alternative to the present system, stakeholders' views should be taken into consideration. Thus, human rights advocates tend to minimise the importance of States' interest and economic capabilities of receiving refugees, while governments, on the other hand, for various and complex reasons, tend to overlook human rights violations when establishing their migration policies. Even though one side might have a better point to make than the other, it is still obvious that the two, sometimes opposing, interests exist and must be reconciled. Any reform of the Dublin system should start with this basic assumption. Sometimes, even if governments would desire to contribute more by offering more resources or accepting more refugees or asylum-seekers, they are still under the pressure of public opinion, which, in most cases, turns out to be more or less uninterested on the whole in receiving more refugees or asylum-seekers. The situation is indeed very complex and it has not only legal and humanitarian undertones, but also political and economic ones. And all must be taken into consideration when discussing state responsibility for refugees and asylum-seekers.

One interesting approach, for example, comes from a law and economics perspective and offers a market-based solution.[29] A market of refugees and asylum-seekers would be created and it would operate based on Tradable Refugee Quotas (TRQs),[30] where Member States of the EU would be incentivised to contribute more to the market by taking in more refugees and asylum-seekers than initially promised (assuming that, in the initial phase, Member States would agree to take in a certain number of refugees and asylum-seekers).[31] The incentive would be under the form of funding for complying with the quota initially agreed upon, with the countries accepting more refugees and asylum-seekers receiving extra funding.[32] On the other hand, countries not living up to the initial promised quotas would pay for accepting fewer refugees and asylum-seekers than initially agreed upon.[33] This market would then be supplemented by a matching system which would take into consideration refugees' and asylum-seekers' preferences for certain Member States.[34] It is noteworthy that, presently, the Dublin III Regulation does

[28] In the joined cases of Aranyosi and Căldăraru, the CJEU held that a real risk of inhuman or degrading treatment can require a Member State to refuse extradition under a European Arrest Warrant. Thus, even in the case of a harmonized area of EU law, mutual trust can give way to the respect of fundamental rights. See Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru, [2016] ECLI:EU:C:2016:198.

[29] Moragay and Rapoport 2015, see supra note 6.

[30] Ibid, p. 640.

[31] Ibid, p. 651.

[32] Ibid.

[33] Ibid.

[34] Ibid, p. 653.

not require Member States to take into consideration asylum-seekers' consent, except in the case of the humanitarian discretionary clause under Article 17 (2).

According to this proposal, Member States would be penalised for not taking in the promised quotas and would, thus, be incentivised to improve their asylum conditions and attract more refugees and asylum-seekers in order to fill in the promised quotas.[35] On the other hand, Member States' preferences should also be taken into consideration and where there is a more or less good match between individual refugees' and asylum-seekers' preferences and those of a specific country, the transfer should operate.[36]

This proposal is loosely based on the European Relocation from Malta (EUREMA) program in 2009, in which 12 EU Member States participated voluntarily in order to alleviate the burden Malta had incurred due to high numbers of refugees and asylum-seekers. According to the European Asylum Support Office (EASO), while some Member States did not conform to the initial quotas promised, out of the 253 individuals envisaged for relocation, 227 benefited from this pilot project and were transferred from Malta.[37] The project was extended and EUREMA II, which operated from 2012 until 2013, managed to transfer 217 of the envisaged 306 refugees and asylum-seekers.[38] Although the pilot project was limited in number, it does provide for a strong alternative to the Dublin System.

If the Dublin System is to receive an overhaul, burden-sharing should be the basis of the new reform. Indeed, the European Commission has recently proposed (yet another) recast Dublin Regulation in 2016.[39] According to the proposal, "the new Dublin scheme will be based on a European reference system from the start of its implementation with an automatically triggered corrective solidarity mechanism as soon as a Member State carries a disproportionate burden".[40] However, it keeps the old criteria and setting, while the main addition is a corrective allocation mechanism[41] which would be triggered when a particular Member State is faced with disproportionate numbers of applications for international protection for which that Member State is responsible.[42] Member States not participating in the allocation procedure would be obliged to make a solidarity contribution of 250,000 Euros per each applicant who would have otherwise been allocated to that Member State.[43]

There is definitely a striking resemblance between the law and economics solution described earlier and the above proposal by the Commission. However, it has been criticised in a very recent European Parliament briefing[44] for not providing a complete overhaul of the system and not instead creating, as the Parliament had previously suggested[45], a centralised EU system for collecting applications and

[35] Ibid, p. 655.

[36] Ibid, pp. 655-656.

[37] European Asylum Support Office (2013), Annual Report on the Situation of Asylum in the European Union 2012, Publications Office of the European Union, Luxembourg.

[38] European Asylum Support Office (2012), EASO Fact Finding Report on Intra-EU Relocation Activities from Malta.

[39] Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, Brussels, 4.5.2016.

[40] Ibid, p. 4.

[41] Ibid, Article 34, p. 67.

[42] Ibid.

[43] Ibid, Article 37 (3), p. 69.

[44] Reform of the Dublin System, 10 March 2017, available online at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI(2016)586639_EN.pdf (6 May 2017).

[45] European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), para. 38.

allocating responsibility. The proposal has also been criticised by the Committee of Regions,[46] the European Economic and Social Committee,[47] national parliaments,[48] the European Council on Refugees and Exiles[49] and the EU Agency for Fundamental Rights,[50] amongst others, citing lack of emphasis on refugees' and asylum-seekers' individual situations and on the child's best interests. The corrective allocation mechanism, on the other hand, has been welcomed as a major improvement. It is now to be seen whether this new revised instrument will, if it comes into force in this form, overcome the faults of its predecessors and whether it will protect human rights accordingly.

The success of a potential Dublin IV Regulation would, of course, also depend on the Court's jurisprudential output on the matter and on its interpretation of this future instrument. However, in the light of the Court's recent judgment[51] concerning Slovakia's and Hungary's challenge of the 2015 Council Decision[52] to relocate migrants and refugees from Italy and Greece to other EU Member States, it seems that the Court is already laying the groundworks for the future recast Regulation in what concerns one decisive aspect – the principle of solidarity. The Court finally found that the principle of solidarity, found in article 80 TFEU, is a source of legally enforceable obligations for EU Member States.[53] Thus, at least in the case of solidarity, the issue has been clarified and a solidarity mechanism such as that described above can benefit from the Court's jurisprudential support.

[46] Opinion factsheet available online at: http://cor.europa.eu/en/activities/opinions/pages/opinion-factsheet.aspx?OpinionNumber=CDR%203267/2016 (6 May 2017).

[47] The opinion is available online at: http://www.eesc.europa.eu/?i=portal.en.soc-opinions.39248 (6 May 2017).

[48] Six Member States (Hungary, Slovakia, Czechia, Poland, Romania, and Italy) have submitted reasoned opinions that the proposal does not comply with the principle of subsidiarity. They are available online at: http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20160270.do#dossier-COD20160133 (6 May 2017).

[49] ECRE Comments on the Commission Proposal for a Dublin IV Regulation, October 2016, available online at: https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf (6 May 2017).

[50] Opinion of the European Union Agency for Fundamental Rights on the impact on children of the proposal for a revised Dublin Regulation (COM(2016)270 final; 2016/0133 COD), available online at: http://fra.europa.eu/en/opinion/2016/fra-opinion-impact-children-proposal-revised-dublin-regulation (6 May 2017).

[51] Joined cases C-643/15 and C-647/15 Slovakia and Hungary v. the Council, [2017] ECLI:EU:C:2017:631.

[52] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80.

[53] For an analysis of the decision, see Daniela Obradovic, Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy, European Law Blog, 2 October 2017, available online at: http://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/ (6 May 2017).